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No. 88-1685

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following union also appeared in the proceeding before the Board and the court of appeals: General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
A. The development of the Board's no-presumption rule	2
B. The present controversy	6
Introduction and summary of argument	11
Argument:	
The Board's no-presumption rule for assessing union support among striker replacements is a rational construction of the National Labor Relations Act and should therefore be upheld	14
A. The Board's interpretations of the Act, whether based on empirical findings or policy judgments, are entitled to substantial deference if they are rational and consistent with the statute	14
B. Under these principles, the no-presumption rule should be upheld	16
1. The no-presumption rule reflects a rational empirical judgment about the union sentiments of striker replacements	16
2. The no-presumption rule reasonably promotes the stability of collective-bargaining relationships, without impairing the right of employees to select their bargaining representatives	19
3. The no-presumption rule assures that the statutory right to strike will not be unduly chilled by a threat that the union will lose recognition	24
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Allied Indus. Workers, Local 289 v. *NLRB*, 476 F.2d 868 (D.C. Cir. 1973) 26
American Broadcasting Cos. v. *Writers Guild of America, West, Inc.*, 437 U.S. 411 (1978) 14
American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965) 24
Arthur A. Borchert, 90 N.L.R.B. 944 (1950), enforced, 188 F.2d 474 (4th Cir. 1951) 4
Automated Business Systems v. *NLRB*, 497 F.2d 262 (6th Cir. 1974) 24
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 25-26, 27
Beth Israel Hosp. v. *NLRB*, 437 U.S. 483 (1978) .. 12, 14, 15, 16
Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 (1983) 15
Brooks v. *NLRB*, 348 U.S. 96 (1954) 3
Buckley Broadcasting Corp., Local 51, 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending No. 88-7106 (9th Cir. filed Mar. 7, 1988) 5, 6, 8, 11, 16, 17, 25
C & C Plywood Corp., 163 N.L.R.B. 1022 (1967) . 4
C. H. Guenther & Son, Inc., 174 N.L.R.B. 1202 (1969), enforced, 427 F.2d 983 (5th Cir.), cert. denied, 400 U.S. 942 (1970) 23
Charles D. Bonanno Linen Service, Inc. v. *NLRB*, 454 U.S. 404 (1982) 14
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 15
Dold Foods, Inc., 289 N.L.R.B. No.156 (July 28, 1988) 18
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 3, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24
Ford Motor Co. v. *NLRB*, 441 U.S. 488 (1979) ... 14
Gilpin v. *AFSCME*, 875 F.2d 1310 (7th Cir. 1989) . 18

Cases—Continued: Page

Great Southern Trucking Co. v. *NLRB*, 139 F.2d 984 (4th Cir.), cert. denied, 322 U.S. 729 (1944) . 4
Hajoca Corp. v. *NLRB*, 872 F.2d 1169 (3d Cir. 1989) 19, 28
Jackson Mfg. Co., 129 N.L.R.B. 460 (1960) 4
James W. Whitfield, 220 N.L.R.B. 507 (1975) 5
Kurz-Kasch, Inc., 286 N.L.R.B. No. 131 (Nov. 30, 1987), remanded, 865 F.2d 757 (6th Cir. 1989) .. 21
Laher Spring & Electric Car Corp., 192 N.L.R.B. 464 (1971) 21
Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970) 26
Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965) ... 4
Lyng v. *International Union, United Automobile Workers*, 108 S. Ct. 1184 (1988) 17
Magic Chef, Inc., 286 N.L.R.B. No. 33 (Mar. 31, 1986) 21
National Plastic Products Co., 78 N.L.R.B. 699 (1948) 4
NLRB v. *Baptist Hosp., Inc.*, 442 U.S. 773 (1979) . 15
NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) 3
NLRB v. *Crimptex, Inc.*, 517 F.2d 501 (1st Cir. 1975) 23
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 14, 24, 25, 26
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) 26
NLRB v. *Financial Institution Employees, Local 1182*, 475 U.S. 192 (1986) 19
NLRB v. *Franks Bros.*, 137 F.2d 989 (1st Cir. 1943), aff'd, 321 U.S. 702 (1944) 4
NLRB v. *Frick Co.*, 423 F.2d 1327 (3d Cir. 1970) .. 24
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969).. 23
NLRB v. *Granite State Joint Board*, 409 U.S. 213 (1972) 17

Cases – Continued: Page

NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) 26
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) 15
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 22
NLRB v. *Local Union No. 103, Iron Workers*, 434 U.S. 335 (1978) 14
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 24
NLRB v. *Murray Products, Inc.*, 584 F.2d 934 (9th Cir. 1978) 26
NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953) 15
NLRB v. *Truck Drivers*, 353 U.S. 87 (1957) 14
NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) 14, 16
Pattern Makers' League of North America v. *NLRB*, 473 U.S. 95 (1985) 28
Pennco, Inc., 250 N.L.R.B. 716 (1980), enforced, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982) 3, 5, 18
Peoples Gas System, Inc., 214 N.L.R.B. 944 (1974), rev'd and remanded *sub nom. Teamsters Local Union 769* v. *NLRB*, 532 F.2d 1385 (D.C. Cir. 1976) 4
Randall, Div. of Textron, Inc. v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) 27
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 (1945) 15
Retired Persons Pharmacy v. *NLRB*, 519 F.2d 486 (2d Cir. 1975) 3, 24
Stoner Rubber Co., 123 N.L.R.B. 1440 (1959) 4
Titan Metal Mfg. Co., 135 N.L.R.B. 196 (1962) ... 4

Cases – Continued: Page

Trans World Airlines, Inc. v. *Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989) 17-18, 27
United States Gypsum Co., 157 N.L.R.B. 652 (1966) 3
Windham Community Memorial Hosp., 230 N.L.R.B. 1070 (1977), enforced, 577 F.2d 805 (2d Cir. 1978) 3, 4-5
Whisper Soft Mills, Inc. v. *NLRB*, 754 F.2d 1381 (9th Cir. 1984) 3

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) 26
§ 7, 29 U.S.C. 157 2
§ 8(a)(1), 29 U.S. 158(a)(1) 2, 3, 9
§ 8(a)(5), 29 U.S.C. 158(a)(5) 2, 3, 8, 9
§ 9, 29 U.S.C. 159 2
§ 9(c)(3), 29 U.S.C. 159(c)(3) 3
§ 13, 29 U.S.C. 163 24
29 C.F.R. 101.18(a) 3

Miscellaneous:

Estreicher, *Strikers and Replacements*, 38 Lab. L. J. (CCH) 287 (1987) 22, 26
Flynn, *The Economic Strike Bar: Looking Beyond The "Union Sentiments" Of Permanent Replacements*, 61 Temple L. Rev. 691 (1988) 21, 26
R. Gorman, *Labor Law* (1976) 10, 23
Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984) 21
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (GPO 1959) 23

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 859 F.2d 362. The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) are reported at 287 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a) was entered on November 4, 1988, and a petition for rehearing was denied on December 22, 1988 (Pet. App. 56a-57a). On March 8, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 21, 1989. The petition was filed on April 17, 1989, and was granted on June 26, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5), provides:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

A. The Development Of The Board's No-Presumption Rule

1. Pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. 159, the National Labor Relations Board may certify a particular labor organization as the exclusive bargaining representative for a company's employees. Once the Board has done so, the union "usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987). Accord *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing*, 482 U.S. at 38; *Burns International*, 406 U.S. at 279 n.3. An employer may rebut that presumption and withdraw recognition from the union by showing either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[1] The question presented in this case is whether, in evaluating an employer's claim that it has an objective, reasonable basis for doubting a union's majority status, the Board must presume that striker replacements oppose the union.

The Board has long held that *new employees* in general (as opposed to *striker replacements* in particular) may be presumed to support an incumbent union in the same pro-

[1] See, *e.g.*, *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing*, 482 U.S. at 41 n.8. If the union contests the withdrawal of recognition and the employer is unable to sustain his burden, the Board will find a violation of Section 8(a)(5) and (1) of the Act. Employee members of the bargaining unit may petition for a decertification election upon a showing that at least 30% of the unit employees do not want to be represented by the bargaining representative. 29 C.F.R. 101.18(a). An employer who has a good faith doubt of continuing majority status may also petition for a decertification election. *United States Gypsum Co.*, 157 N.L.R.B. 652, 655-656 (1966).

portion as the employees they replace. *National Plastic Products Co.*, 78 N.L.R.B. 699, 706 (1948); *C & C Plywood Corp.*, 163 N.L.R.B. 1022, 1028 (1967). See also *Great Southern Trucking Co.* v. *NLRB*, 139 F.2d 984, 985-986 (4th Cir.), cert. denied, 322 U.S. 729 (1944); *NLRB* v. *Franks Bros.*, 137 F.2d 989, 995 (1st Cir. 1943), aff'd, 321 U.S. 702 (1944).[2] At least initially, however, the Board did not apply that presumption in assessing the union sentiments of striker replacements. In its earliest decisions, the Board held that, in establishing a good faith doubt, it was not "unreasonable [for an employer] to assume that none of [its] permanent replacements were union adherents" (*Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959)). Accord *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("most improbable" that "the replacements hired during the strike had chosen the Union to represent [them]"); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) (same). But cf. *Arthur A. Borchert*, 90 N.L.R.B. 944, 946 (1950), enforced in relevant part, 188 F.2d 474 (4th Cir. 1951) ("no certainty" that replacements not themselves union adherents).

In a 1974 decision, however, the Board recognized that "replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation" (*Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 947 (1974), reversed and remanded on other grounds *sub nom. Teamsters Local Union 769* v. *NLRB*, 532 F.2d 1385, 1391 (D.C. Cir. 1976)). And by the late 1970s, the Board, breaking entirely with its earlier decisions, extended the presumption regarding other employees to striker replacements. See *Windham Community Memorial Hosp.*,

[2] For that reason, the Board has historically held, an employer may not base an assertion of good faith doubt on "[e]mployee turnover standing alone." *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482, 1484 (1965).

230 N.L.R.B. 1070 (1977), enforced, 577 F.2d 805 (2d Cir. 1978); *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), enforced, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *James W. Whitfield*, 220 N.L.R.B. 507, 509 (1975). As the Board stated in *Windham Community Memorial Hosp.*, "[t]he general rule * * * is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced" (230 N.L.R.B. at 1070).

2. In its 1987 decision in *Buckley Broadcasting Corp., Local 51, (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) (Pet. App. 58a-91a), the Board revisited the issue. Based on its empirical judgment and considerations of policy, the Board held that no presumption is warranted regarding the extent of union support among striker replacements. Noting that the courts of appeals had "uniformly rejected" its prior position—that permanent replacements are presumed to support the union in the same ratio as the striking employees whom they replaced—the Board "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (Pet. App. 72a, 74a). The Board concluded that no such "universal" generalizations could be drawn. It therefore found "no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation" (*id.* at 75a).

Correspondingly, the Board found "the contrary presumption"—that "permanent replacements who cross a

picket line * * * repudiate the union"—"equally unsupportable" (Pet. App. 75a). It noted that a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). In addition to the fact that the contrary presumption is "not factually compelling" (*ibid.*), the Board observed that "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (*id.* at 75a-76a).

In short, the Board in *Station KKHI* "discern[ed] no overriding generalization about the views held by strike replacements and therefore * * * decline[d] to maintain or create any presumptions regarding their union sentiments" (Pet. App. 76a). Instead, the Board held that it would henceforth "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status" (*ibid.*).

B. The Present Controversy

1. Respondent in a Texas corporation that trades in laboratory instruments and supplies and maintains a warehouse in Houston. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers (the Union) as the collective bargaining agent for respondent's production and maintenance employees. On May 21, 1979,[3] the latest collective-bargaining agreement between the parties expired, and on May 25 the company made its final offer. The Union rejected that offer on May

[3] All dates given are in 1979 unless otherwise noted.

29. Respondent locked out all 27 bargaining-unit employees from June 4 to June 12, when respondent renewed its offer of May 25. The Union again rejected it. Pet. App. 2a-3a.

On June 13, the Union began an economic strike. Five of the 27 bargaining-unit employees immediately crossed the picket line and returned to work. On June 17, respondent put into effect the wage schedule proposed in its May 25 offer. On June 25, with the strike still in progress, respondent hired 29 new employees to replace the 22 strikers.[4]

On July 16, the Union ended its strike, offering unconditionally to accept the May 25 offer. On July 19, the Union asked respondent to execute a contract embodying the May 25 terms. The following day, July 20, respondent notified the Union that the May 25 offer was unavailable. It also stated that because it entertained doubts about the Union's continued majority status, it was withdrawing recognition and refusing to bargain further. As of that date, the bargaining unit consisted of 19 employees who had participated in the strike, 25 replacements, and five "crossover" employees who had crossed the picket line and were then working for the company. Pet. App. 3a.

Also on July 20, the Union asked the respondent to furnish information regarding the total number of bargaining-unit employees on the payroll, and the job classification and seniority of each of those employees. Respondent refused. Pet. App. 3a-4a.

[4] Respondent's director of employee relations "testified that 29 replacements were hired although only 22 jobs had been opened up by the strike because the Respondent anticipated that some of the hirees would not cross the picket line, that there would be some turnover within a group of new employees that large, and that additional workmen would be needed during the initial training period." Pet. App. 30a n.9.

2. On July 30, the Union filed an unfair labor practice charge with the Board, alleging violations of Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). J.A. 112. On September 7, following an investigation, the General Counsel issued a complaint. J.A. 114; Pet. App. 4a.

The Board, reversing the Administrative Law Judge, held that respondent lacked a reasonable doubt concerning the Union's majority status. Pet. App. 25a-54a. The Board found that "the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative" (*id.* at 32a). The Board explained that "[t]he failure of employees to join an economic strike may indicate their economic concerns rather than a lack of support for the union" (*id.* at 32a-33a). The Board also found that certain statements of six employees did not clearly evince "repudiations of the Union as the collective-bargaining representative" (*id.* at 34a), and that even if they did, "it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to keep the Union as the collective-bargaining representative" (*id.* at 34a-35a).[5]

Finally, relying on its decision in *Station KKHI*, the Board explained (Pet. App. 33a) that it would not "use any presumptions with respect to the[] union sentiments" of the 25 striker replacements. The Board stated that it would "instead * * * take a case-by-case approach," requiring "additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt"

[5] The Board found that the remarks of a seventh employee "conveyed only a disapproval of the Union's conduct of the strike," rather than a general "repudiation of the Union as the employees' representative" (Pet. App. 33a).

(*ibid.*). Applying that standard, the Board concluded that "[t]aking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, * * * the evidence is insufficient to rebut the presumption of the Union's continuing majority status" (*id.* at 35a).[6] It therefore held that respondent had violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, by refusing to furnish the information that the Union had requested, and by refusing to execute the collective-bargaining agreement proposed by the Union on July 19 and embodying the terms offered by respondent on May 25 (Pet. App. 35a-38a). The Board ordered the company to cease and desist; on request, to bargain with the Union and to execute an agreement based on the May 25 terms; to furnish the requested information; and to post an appropriate notice (*id.* at 39a-42a).

3. The court of appeals denied enforcement by a divided vote, concluding that respondent had established a reasonable doubt of the Union's majority status (Pet. App. 1a-24a). The court first noted (*id.* at 6a-8a) that several employees who crossed the picket line, and others who remained on the picket line, had expressed anti-union sentiments to respondent's director of employee relations. The court next rejected the Board's decision to apply no presumption regarding the preferences of the replacements. The court instead approved (*id.* at 9a & n.1) the so-called "Gorman presumption"—drawn from Professor Gorman's labor law text—according to which " 'it is

[6] In particular, the Board found that the replacements' crossing of a peaceful picket line and the Union's failure to contact those replacements during the strike constituted insufficient evidence from which to infer that they opposed the Union. The Board further found that the arguably anti-union comment of one striker replacement was no basis for inferring the union sentiments of the replacements as a whole. Pet. App. 33a-34a.

generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority' " (*id.* at 9a n.1, quoting R. Gorman, *Labor Law* 112 (1976)).[7] The court found that the Gorman presumption was warranted in this case because "a substantial percentage of the bargaining unit employees [was] replaced on the same day, and the striker replacements cross[ed] a picket line" (Pet. App. 10a). Applying that presumption, the court held that "the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (*ibid.*).

Judge Williams dissented (Pet. App. 11a-24a). "The outcome of this case," he explained (*id.* at 12a), "turns on the significance attached to the hiring of permanent replacement workers during an economic strike." In his view, the Board had offered "compelling" reasons for adopting a rule according to which it would "refuse[] to presume that the replacement workers are for or against the union" (*id.* at 13a, 15a). Judge Williams noted that the Board's approach permits it "to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status" (*id.* at 15a). Observing that "there is a conflict among the circuits" regarding which, if any, presumption should be applied (*id.* at 17a-18a), Judge Williams concluded that "[t]he refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not

[7] The term "Gorman presumption" is a misleading one, since it does not appear that Professor Gorman was advocating such a presumption, only that he was reporting the Board's approach as he then understood it. See R. Gorman, *Labor Law* 112-113 (1976).

inconsistent with the National Labor Relations Act" (*id.* at 16a). Accordingly, he stated, "even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions" (*ibid.*). Applying the Board's no-presumption rule for replacements, Judge Williams would have enforced the Board's order requiring respondent to recognize and bargain with the Union (*id.* at 20a-24a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether, in seeking to justify its withdrawal of recognition on the basis of a reasonable doubt of a union's majority status, an employer may invoke a presumption that permanent replacements for striking workers do not support the union. Relying on its decision in *Station KKHI*, the Board held in the present case that no such presumption may be invoked. The Board's "no-presumption" rule is plainly "rational and consistent" with the National Labor Relations Act. The rule was therefore "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42.

Nevertheless, the court of appeals rejected the Board's rule in favor of the so-called Gorman presumption, according to which striker replacements are presumed to oppose the incumbent union. The court's decision misconstrues the no-presumption rule; it substitutes a contrary rule that lacks sufficient empirical or policy support; and it impermissibly second-guesses the Board's accumulated expertise in administering the statute. The judgment of the court of appeals should therefore be reversed.

A. This Court has repeatedly held that "[i]f the Board adopts a rule that is rational and consistent with the Act

* * * then the rule is entitled to deference from the courts." *Fall River Dyeing*, 482 U.S. at 42. Where the Board's decision is based on a reasonable empirical determination, "fashion[ed] * * * in light of its experience" (*Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978)), this Court has consistently accorded substantial deference to the Board's judgment. Deference is likewise appropriate where the Board's decision is based on a policy judgment designed to implement the broad purposes of the statute. "It is the Board," not the courts, "on which Congress conferred the authority to develop and apply the fundamental national labor policy." *Ibid.* If the Board is to accomplish that task, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Id.* at 501.

B. The no-presumption rule is plainly "rational and consistent with the Act" (*Fall River Dyeing*, 482 U.S. at 42). Three independent grounds support the Board's rule.

First, the rule reflects a reasonable empirical judgment about the union sentiments of striker replacements. Workers may cross a picket line for any number of reasons, several of which do not suggest opposition to the incumbent union. After "carefully review[ing] [its] past decisions and assess[ing] [its] experience," the Board concluded that no "universal" generalizations could be drawn (Pet. App. 74a). That judgment is surely a rational one.

Second, the no-presumption rule promotes the stability of collective-bargaining relationships. By requiring the employer to estabish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust the incumbent union simply by replacing a sufficent number of the striking employees. By contrast, the Gorman presumption creates incentives for employers to stonewall negotiations, hire unnecessary replacement

workers, and withdraw recognition from the bargaining representative. As such, the Gorman presumption significantly disserves the policy of " 'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees' " (*Fall River Dyeing*, 482 U.S. at 38 (brackets in original)).

Finally, the Gorman presumption, imposed by the court below, threatens to chill the exercise of the statutory right to strike. Although striking workers know that they may be lawfully and permanently replaced by their employer, they also know that, through negotiation, they may achieve a settlement agreement that entitles them to reclaim their jobs. Imposition of the Gorman presumption would make it easier for the employer to withdraw recognition from the bargaining representative, and thereby to thwart the strikers' efforts to achieve a back-to-work agreement, as well as a variety of other post-strike benefits. If an unsuccessful strike carries with it the likely loss of representation—in addition to the loss of a job—the strike may become a total defeat for the employees, not just one battle in an ongoing contest. That added risk is apt to chill the exercise of the protected right to strike.

Withdrawal of recognition is not simply the use of an "economic weapon" by an employer; it is an attempt to revoke a status conferred on the union by law in order to effectuate the policies of the Act. Thus, the question of the appropriate grounds for withdrawal is one on which the Board's judgment is especially entitled to deference. And the Board's judgment here—that the Gorman presumption is without sufficient empirical support and would "disrupt the balance of competing economic weapons long established in strike situations" (Pet. App. 74a-76a)—was entirely reasonable.

ARGUMENT

THE BOARD'S NO-PRESUMPTION RULE FOR ASSESSING UNION SUPPORT AMONG STRIKER REPLACEMENTS IS A RATIONAL CONSTRUCTION OF THE NATIONAL LABOR RELATIONS ACT AND SHOULD THEREFORE BE UPHELD

A. The Board's Interpretations of the Act, Whether Based on Empirical Findings Or Policy Judgments, Are Entitled To Substantial Deference If They Are Rational And Consistent With The Statute

"The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers,* 353 U.S. 87, 96 (1957). See also *Beth Israel Hosp.* v. *NLRB,* 437 U.S. 483, 501 (1978); *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.,* 437 U.S. 411, 431 (1978); *NLRB* v. *Local Union No. 103, Iron Workers,* 434 U.S. 335, 350 (1978). Accordingly, the Board's judgment, when "applying the general provisions of the Act to the complexities of industrial life," is entitled to substantial deference. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). As this Court has repeatedly held, "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing,* 482 U.S. at 42. Accord *Charles D. Bonanno Linen Service, Inc.* v. *NLRB,* 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979); *Beth Israel Hosp.*, 437 U.S. at 500-501.[8]

[8] Deference is owed decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking"). See also *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U.S. 731, 742 (1983). Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis").

Deference is fully due the Board's empirical judgments that "fashion generalized rules in light of its experience" (*Beth Israel Hosp.*, 437 U.S. at 500). The Board's "[e]veryday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers" (*NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)). And the Board's " '[c]umulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated" (*NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)). This Court has, accordingly, given substantial deference to the Board's empirical judgments, as the agency seeks to "apply[] the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms" (*Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 798 (1945)). See, *e.g.*, *id.* at 803-804; *Beth Israel Hosp.*, 437 U.S. at 500-501. Cf. *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 789 (1979) ("the development of * * * presumptions is normally the function of the Board").

Deference is also required when the Board's decisions are based on policy judgments designed to effectuate the broad purposes of the statute. "It is the Board on which Congress conferred the authority to develop and apply the fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Particularly where the Board's policy judgment reflects the agency's " 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," that judgment "is 'subject to limited judicial review' " (*NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)). "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hosp.*, 437 U.S. at 501.

B. Under These Principles, The No-Presumption Rule Should Be Upheld

1. The no-presumption rule reflects a rational empirical judgment about the union sentiments of striker replacements

As the Board explained in *Station KKHI*, "presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved" (Pet. App. 74a). Guided by that principle, the Board in *Station KKHI* revisited the question whether persons who cross the picket line during an economic strike must be presumed to oppose the incumbent union. The Board "carefully reviewed [its] past decisions and assessed

[its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (*ibid.*). The Board concluded that no such "universal" generalizations could be drawn. It reasoned that a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*id.* at 75a). The Board therefore found the so-called Gorman presumption—imposed by the court below—"not factually compelling" (*ibid.*).

The Board's empirical judgment is entirely rational. Persons may cross a picket line for any number of reasons, some of which do not suggest opposition to the incumbent union. For example, strikes can exact a severe economic toll from those who participate in them. "[A] striking individual faces an immediate and often total drop in income during a strike" (*Lyng* v. *International Union, United Automobile Workers*, 108 S. Ct. 1184, 1192 (1988)). Both strikers and potential replacements may be moved by economic need to work for a struck employer. "[T]he specter of hardship to * * * family" (*NLRB* v. *Granite State Joint Board*, 409 U.S. 213, 217 (1972)) may therefore cause persons to cross a picket line even though they otherwise support the union and the balance of the union's agenda. See, *e.g.*, *International Union*, 108 S. Ct. at 1189 nn. 3, 4. Moreover, strikes are, by their nature, controversial, and "in virtually every strike situation there will be some employees who disagree with their union's decision" and "either refuse[] to strike or abandon[] the strike." *Trans World Airlines, Inc.* v. *Independent Federa-*

tion of Flight Attendants, 109 S. Ct. 1225, 1232 (1989). Thus even when a worker's refusal to participate in a strike represents a profound disagreement with the union's strategy and tactics at that time, that disagreement may not endure, and may not signify a fundamental opposition to union representation. It is not unreasonable to suppose that replacement workers, like the workers they replace, are often motivated by such considerations, and would also value union representation at the conclusion of the strike. Cf. *Gilpin* v. *AFSCME,* 875 F.2d 1310, 1313 (7th Cir. 1989) (class action certification not appropriate because there are "[t]wo distinct types of employees" who decline to join a union: those who are ideologically opposed, and those free riders who are "happy to be represented by a union" but who do not want to pay for its services).[9]

[9] It is true that replacements generally know that the union's primary allegiance is to the striking employees and indeed may be attempting to secure the replacements' discharge. However, as the Board noted in *Dold Foods, Inc.,* 289 N.L.R.B. No. 156 (July 28, 1988), in declining to presume that replacements oppose the union (slip op. 3 (footnote omitted)):

> Unions often demand, at least in the first instance, that the replacements be discharged and the strikers rehired. Frequently, as in the instant case, the union's position may be modified in the course of the negotiations on the issues underlying the strike. Indeed, in the instant case, as the strike wore on, the Union took a progressively weaker position until, at the bargaining session of October 23, it requested only that the Respondent discharge those replacements (about 32 out of 201 total replacements) who had not yet completed the probationary period.

See also *NLRB* v. *Pennco,* 684 F.2d at 342 (since less than half of the replacements would lose their jobs if the strike were settled, there was "no indication" that any particular replacement feared loss of employment).

Because the reasons for crossing a picket line vary from industry to industry, from strike to strike, and from worker to worker, the Board plainly acted rationally in refusing, as an empirical matter, to allow an employer to invoke a presumption that striker replacements oppose the incumbent union. The present case illustrates the wisdom of the Board's determination. As Judge Williams noted in dissent, of the 15 replacement workers interviewed by respondent's personnel director, only one "volunteered any animus toward or opposition to the Union" (Pet. App. 23a-24a & n.8). "The failure of most replacement employees to state an opinion either way lends credence to the Board's position that these workers should not be presumed to be for or against the Union" (*id.* at 23a-24a n.8). See also *Hajoca Corp.* v. *NLRB,* 872 F.2d 1169, 1174-1175 (3d Cir. 1989).

2. The no-presumption rule reasonably promotes the stability of collective-bargaining relationships, without impairing the right of employees to select their bargaining representatives

"The overriding policy of the NLRA is 'industrial peace.' " *Fall River Dyeing,* 482 U.S. at 38. Accord *NLRB* v. *Financial Institution Employees, Local 1182,* 475 U.S. 192, 202-203 (1986). Indeed, as the Court explained in *Fall River Dyeing*, the presumption of a union's majority status following its certification is "based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision"—the policy of " 'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.' " 482 U.S. at 38 (citation omitted; brackets in original). As the Court noted, the presumptions of continued majority support—irrebuttable during the first year, and rebuttable thereafter—

"enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Ibid.* Moreover, the presumptions "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.* "The upshot of the presumptions," the Court concluded, "is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Id.* at 38-39.

The no-presumption rule for gauging the union sentiments of striker replacements promotes the same purposes. By requiring the employer to establish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust an incumbent union simply by replacing a sufficient number of its members. Only by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status. The no-presumption rule is thus in harmony with the overall rebuttable presumption of continued majority support for the union, and accordingly furthers the interest in bargaining stability.

By contrast, the Gorman presumption, adopted by the court below, would disserve the policy of stable bargaining relationships in two respects. First, it would discourage employers from engaging in good-faith bargaining with the union, see *Fall River Dyeing,* 482 U.S. at 38; by inviting a strike, employers would be creating an opportunity to hire striker replacements who would be presumed to be anti-union. And once a strike had begun, the Gorman

presumption would discourage employers from reaching settlements with the incumbent union, encouraging them instead "to withdraw from bargaining upon the mere addition of the requisite number of permanent replacements to the payroll." Flynn, *The Economic Strike Bar: Looking Beyond The "Union Sentiments" Of Permanent Replacements,* 61 Temple L. Rev. 691, 706 (1988). Second and relatedly, by relieving the employer of the burden of coming forth with evidence that the striker replacements actually oppose the union, the Gorman presumption would make it easier for an employer to justify a withdrawal of recognition. The Gorman presumption thereby increases the chances that the incumbent union would be ousted by the employer once the strike began.[10]

The interest in bargaining stability—promoted by the no-presumption rule, but strongly disserved by the Gorman presumption—is vitally at stake in the context of an economic strike. Strikes are "part and parcel of the system

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[10] As in the present case, employers sometimes hire more replacements than strikers, asserting concerns over inexperience or anticipated attrition; it is particularly important to assure that those decisions are not made for the purpose of unseating the union. See Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements,* 61 Temple L. Rev. 691, 692 n.7, 705 (1988) (noting increased willingness of employers to hire permanent replacements and the opportunity this provides to "oust" union). See also Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 Harv. L. Rev. 351, 362, 390 (1984). The willingness of some employers to oust a union is reflected in cases in which the Board has found a violation based on the hiring of excessive replacements for the purpose of depriving strikers of reinstatement rights. See *Magic Chef, Inc.,* 286 N.L.R.B. No. 33 (Mar. 31, 1986), slip op. 21-22. See also *Kurz-Kasch, Inc.,* 286 N.L.R.B. No. 131 (Nov. 30, 1987), slip op. 42-47, remanded, 865 F.2d 757 (6th Cir. 1989) (discriminatory failure to reinstate strikers as vacancies occurred); *Laher Spring & Electric Car Corp.,* 192 N.L.R.B. 464, 464-466 (1971).

that the Wagner and Taft-Hartley Acts have recognized" (*NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 489 (1960)), and Congress intended them to be part of collective bargaining, not the engine of its destruction.[11] Where economic strikers have been permanently replaced, however, the post-strike union—as in the successorship situation considered in *Fall River Dyeing*—"is in a peculiarly vulnerable position" (482 U.S. at 39).[12] Because the workforce, and the sentiments of the employees, are in a state of flux, the post-strike union cannot be certain whether it will command sufficient support to continue as the exclusive representative. "[D]uring this unsettling transition period" (*ibid.*), the no-presumption rule reduces the employer's incentive to stonewall negotiations, and limits the employer's ability to oust the union by the simple expedient of replacing its membership.[13]

Even as it promotes the stability of the bargaining relationship, the Board must also be responsive to the " 'free choice' of employees" in selecting or rejecting a bargaining

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[11] As one commentator has put it (Estreicher, *Strikers and Replacements,* 38 Lab. L. J. (CCH) 287, 288 (1987)):

> [W]hile economic conflict is an essential, legitimate feature of our collective bargaining system, a strike should ordinarily not provide an occasion for terminating the bargaining relationship. The strike is a means of resolving a dispute, not destroying the underlying bargaining structure. * * *
>
> [W]e are dealing with a form of limited warfare, cabined by a set of rules to make sure that the relationship survives the conflict.

[12] The present case illustrates that vulnerability. At the conclusion of the strike, when the Union capitulated and agreed to accept respondent's May 25 contract offer, respondent nevertheless refused to renew that offer and instead withdrew recognition from the Union.

[13] Congress's 1959 amendment of Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), reflects the statutory policy of encouraging stability

representative (*Fall River Dyeing*, 482 U.S. at 38). The no-presumption rule is fully consistent with that objective. Although the rule does not entitle an employer automatically to treat replacements as union opponents, the employer remains free to marshal evidence concerning the replacements' sentiments, and thereby to establish its good-faith doubt of the union's majority status.[14] Similarly, the employees "are not powerless to reject a union that they believe no longer commands their support" (*id.* at 50 n.16). All employees, including striker replacements, are free to invoke the Board's election procedures during or after a strike by filing a decertification petition. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969).[15]

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in the bargaining unit. Prior to 1959, Section 9(c)(3) provided that "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote" for a bargaining representative. Characterizing that provision as "an unfair, 'union busting' rule," that could be used " 'to destroy a union' during an economic strike" (*Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 427-429, 452, 1064-1065, 1070, 1138 (GPO 1959)), Congress in 1959 amended Section 9(c)(3) to permit replaced economic strikers to vote in any election conducted within 12 months after commencement of the strike. The no-presumption rule regarding striker replacements is consistent with Congress's evident desire to foster continuity and stability in the bargaining relationship during the course of an economic strike. See *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1203 (1969), enforced, 427 F.2d 983 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *NLRB* v. *Crimptex, Inc.*, 517 F.2d 501, 504 (1st Cir. 1975).

[14] For a summary of instances in which such a showing has been made in the past, see R. Gorman, *Labor Law* 110-111 (1976).

[15] If the petition is supported by a majority of the bargaining unit, it will probably justify the employer's withdrawal of recognition. See

3. *The no-presumption rule assures that the statutory right to strike will not be unduly chilled by a threat that the union will lose recognition*

Section 13 of the Act, 29 U.S.C. 163, states that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." The Act's "solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223-234 (1963). To be sure, this "solicitude for the right to strike" does not immunize strikers from all adverse consequences, for the employer is entitled to use economic weapons of its own. Thus, in the interests of carrying on its business during an economic strike, an employer may permanently replace its striking workers, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938), and may use the lockout offensively, *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 310 (1965), even though such tactics may diminish the effectiveness of a strike.

Automated Business Systems v. *NLRB*, 497 F.2d 262, 270 n.6 (6th Cir. 1974). If supported by a 30% showing, it will ordinarily trigger a Board election. See *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 490 (2d Cir. 1975) ("When an employer refuses to engage in collective bargaining allegedly in defense of the rights of his employees, it is proper for the Board to strike the balance differently from the situation when the employees themselves assert their own rights and demand a decertification election.") Cf. *Fall River Dyeing*, 482 U.S. at 50 n.16 (disapproving employer's reliance on employees' rights in justifying refusal to bargain); *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1334-1335 (3d Cir. 1970).

Forging the appropriate balance between these competing economic weapons is one of the Board's central tasks. It is the Board, and not the courts, that must "weigh[] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner" (*NLRB* v. *Erie Resistor Corp.*, 373 U.S. at 229). Thus, in *Erie Resistor*, the Court upheld the Board's judgment that an offer of superseniority to replacement employees and crossovers was unlawful, noting that "[s]uper-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative" (*id.* at 231). And the Court emphasized that striking the appropriate balance is the Board's responsibility, in light of its "special understanding of 'the actualities of industrial relations' " (*id.* at 236).

Performing that function in *Station KKHI*, the Board reasonably concluded that adopting the Gorman presumption "would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative * * *" (Pet. App. 75a-76a). As a practical matter, the Board noted, the Gorman presumption would allow employers to terminate a bargaining relationship whenever a strike occurs, simply by hiring sufficient permanent replacements to constitute a majority of the unit.

If adopted, the Gorman presumption would therefore threaten striking workers with more than the risk of job loss. Although employees know that they risk being permanently replaced when they undertake an economic strike, they also know that many strikes ultimately result in a strike settlement agreement that entitles the strikers to reclaim their jobs. See *Belknap, Inc.* v. *Hale*, 463 U.S.

491, 503-504 (1983).[16] If employers are permitted to cease recognizing the union during a strike once they have hired sufficient permanent employees to doubt the union's majority status, the employees may lose not only their jobs, but also a representative to negotiate a satisfactory strike settlement. And once the strike has ended, the loss of a bargaining representative diminishes the chances that strikers—who remain employees under the statute—will be notified of vacancies when they occur, and restored to their positions. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970); 29 U.S.C. 152(3) ("employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute").[17]

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[16] As Professor Estreicher has noted, a strike is a "period in flux, when the status of both replacements and strikers has yet to be fixed because the strike has not ended, and much will turn on the manner in which the strike is settled." 38 Lab. L. J. (CCH) at 293. See also *Flynn*, 61 Temple L. Rev. at 705-706.

[17] The termination of an economic strike may generate a variety of other issues that the union can play an instrumental role in resolving. Once reinstated, strikers are entitled to receive all former rights and privileges as employees, including seniority. *Erie Resistor*, 373 U.S. at 233. They may need the union to realize those rights when reinstated. Other questions may arise as to (1) whether striker replacements are "permanent," and thus whether strikers are entitled to an immediate offer of reinstatement (see, *e.g.*, *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 938-939 (9th Cir. 1978)); (2) whether the employer's offer of reinstatement was invalid, either because the reinstatement or the offer itself was improperly conditional (see, *e.g.*, *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 27-32 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. at 223, 225); (3) whether strikers have forfeited reinstatement due to misconduct (see, *e.g.*, *Allied Indus. Workers, Local 289* v. *NLRB*, 476 F.2d 868, 878-881 (D.C. Cir. 1973)); or (4) whether limited jobs, promotional opportunities, or other benefits belong to strikers, replacements, or crossovers (see, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1241-1249 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983)). The absence of a union may mean, as a practical matter, that such often complex issues may not be resolved properly or, indeed, raised at all by unrepresented employees.

Threatening strikers with a loss of their representative, as well as their jobs, greatly enhances the risks of an unsuccessful strike. As long as the union remains the representative of the bargaining unit, the striking employees, upon their ultimate return to work, will obtain whatever benefits the union is able to secure, and may continue their collective efforts. If, on the other hand, an unsuccessful strike carries with it the likely loss of representation, the strike becomes not just one battle in an ongoing contest, but potentially a total defeat—one that concludes the contest with a loss of the bargaining relationship. That added risk is likely to chill the exercise of the right to strike.

* * * * *

An employer's withdrawal of a union's recognition as bargaining representative is not simply the use of an "economic weapon"; it is an attempt to revoke a status conferred on the representative by law in order to effectuate the policies of the Act. Thus the question of the appropriate grounds for withdrawal is one on which the Board's expert judgment is especially entitled to deference.

In the present case, the Board has exercised its judgment by declining to allow invocation of the Gorman presumption and by following instead a no-presumption rule. That determination—based on both empirical and policy grounds—is entirely reasonable, and the decision of the

court of appeals, resting solely on its own preference for the Gorman presumption, should be reversed.[18]

[18] A preference for the Gorman presumption does not, of course, justify a departure from the no-presumption rule adopted by the Board. As this Court has explained, "[w]here the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.' " *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 114 (1985).

The court of appeals also seems to have misunderstood the way in which the no-presumption rule operates. The court surmised that the no-presumption rule "has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace" (Pet. App. 9a). As Judge Williams explained in dissent (*id.* at 17a), however, the two standards operate quite differently. To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support. But unlike the Board's prior standard, the no-presumption rule does not require the employer to overcome the additional "presumption that the replacement workers * * * support the union" (*ibid.*). See also *Hajoca Corp.* v. *NLRB*, 872 F.2d 1169, 1174-1175 (3d Cir. 1989) ("*Station KKHI* removed the employer's initial hurdle of having to come forward with evidence sufficient to show that replacement workers did not support the union, and then further evidence to carry its burden to show an objective basis for a good faith doubt"). The court of appeals' failure to recognize the practical differences between the Board's present and prior standards apparently contributed to the court's unwillingness to accept the no-presumption rule in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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